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No. 80-128

In the Supreme Court of the United States

October Term, 1980

INVESTORS RESEARCH CORPORATION, et al.,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

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ARGUMENT

In its brief in opposition to the Petition for Writ of Certiorari the Commission argues that the Commission found merely that upon a showing of a conflict of interest, the burden of proof shifted to the Petitioners to show the value of the computer system, and it minimizes the irrebuttable and conclusive inference which the Commission in fact adopted which made such proof by Petitioners irrelevant. The point is clearly made in its footnote 28 at A40 of the Petition, wherein the Commission held that even a sale at fair market value would be a violation of Section 17(e)(1). Since no proof of value would satisfy

the Commission, it is apparent that the payment itself, which creates the conflict of interest, constitutes in the Commission's view a violation of the Act. The Court of Appeals for the Tenth Circuit, unlike the Court of Appeals in the instant case, held in *Decker*[1] "that such an interpretation of Section 17(e)(1) is too expansive."[2]

The Commission attempts to differentiate *Decker* because in *Decker* the adviser introduced expert testimony as to the value of the services provided. The Commission implies that such testimony is the only method of proving value. Value may be proved by other evidence than expert testimony, and it is not unusual for the trier of fact to reject the testimony of experts and rely on other evidence instead.[3] Indeed, it is hornbook law that when there is no market and no market value, which as the Commission admits is the situation here,[4] other evidence is relevant to prove value.

> "Where personal property is without market value, then the law allows the next best evidence to be given to ascertain its value. Evidence as to the actual or intrinsic value of such property, or of the value of such property to the owner, other than evidence of mere sentimental or fanciful value attached to the property by the owner, has been held admissible under such circumstances. Evidence as to the original cost in money of personal property having no real market value, and of the cost of replacement or reproduction of such property or of the cost of repairs where such

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1. Petitioners' Supplemental Brief A1-A16.

2. Petitioners' Supplemental Brief A7.

3. See, for example, *Seas Shipping Company, Inc. v. Commissioner*, 371 F.2d 528 (C.A.2 1967).

4. Petition for Certiorari A38-9.

> property is merely damaged or injured, has been held relevant and admissible. It is necessary, however, before such proof may be given, that it appear that the property had no market value; in other words, lack of market value is a necessary condition to the admissibility of evidence of intrinsic or actual value, unless the property is of such nature as to have no real market value."[5]

The Commission in its opinion in the instant case referred only to evidence of the reproduction cost of the computer program, and the Commission in its brief here refers only to the reproduction cost of the program and the value of a computer service that was not comparable. Both the opinion and the brief misstate the case because Petitioners offered substantial evidence of numerous relevant factors from which the Commission could have found the value of the services rendered.[6] Likewise, in *Decker,* the Petitioner "called several witnesses and produced documentary evidence to explain the bona fides of the agreement, the nature of the services performed by FIC and the need of J & L International for such services."[7] The Court held that it was error "completely to disregard other valuation evidence which is properly received in the record."[8] There is no merit at all in the suggestion that the Commission need consider only expert testimony and that it may ignore other valuation evidence.

Decker cannot be distinguished from the instant case, and the two cases are clearly in conflict.

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5. 29 Am.Jur.2d, Evidence, Sec. 387.
6. Petitioners' Supplemental Brief, Page 3.
7. Petitioners' Supplemental Brief A9.
8. Petitioners' Supplemental Brief A10.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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